

PARRA VICTOR

NAME

P- 58682

PRISON NUMBER

P.O. Box. 799002

CURRENT ADDRESS OR PLACE OF CONFINEMENT

San Diego CA. 92179

CITY, STATE, ZIP CODE

In pro se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FILED
MAR 13 2008
CLERK, U.S. DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA BY <i>RJM</i> DEPUTY

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FILING FEE PAID
Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
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Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
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'08 CV 0472 J LSP

Civil No.

(TO BE FILLED IN BY CLERK OF U.S. DISTRICT COURT)

PARRA VICTOR

(FULL NAME OF PETITIONER)

PETITIONER

v.

TILTON E. JAMES

(NAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER [E.G., DIRECTOR OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS])

RESPONDENT

and

EDMUND G. BROWN JR.

The Attorney General of the State of California, Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUSUNDER 28 U.S.C. § 2254
BY A PERSON IN STATE CUSTODY

1. Name and location of the court that entered the judgment of conviction under attack: Superior Court of California County of Imperial, 939 Main Street El Centro CA. 92243
2. Date of judgment of conviction: October 4, 2005
3. Trial court case number of the judgment of conviction being challenged: JCF 15497
4. Length of sentence: Upper Term of Four (4) years

cl

5. Sentence start date and projected release date: To be served consecutive to current term of 18 years to life term. Projected release date Unknown
6. Offense(s) for which you were convicted or pleaded guilty (all counts): 4501.5 of the State of California Penal Code
7. What was your plea? (CHECK ONE)
- (a) Not guilty
- (b) Guilty
- (c) Nolo contendere
8. If you pleaded not guilty, what kind of trial did you have? (CHECK ONE)
- (a) Jury
- (b) Judge only
9. Did you testify at the trial?
- Yes No

DIRECT APPEAL

10. Did you appeal from the judgment of conviction in the California Court of Appeal?
 Yes No
11. If you appealed in the California Court of Appeal, answer the following:
- (a) Result: Conviction and Sentence was Affirmed
- (b) Date of result, case number and citation, if known: October 11, 2006, Case No.
D 047704
- (c) Grounds raised on direct appeal: See page 3 (Next page)

12. If you sought further direct review of the decision on appeal by the California Supreme Court (e.g., a Petition for Review), please answer the following:
- (a) Result: Denied without prejudice (see Attachment 1)
- (b) Date of result, case number and citation, if known: December 20, 2006,
Case No. S 148092
- (c) Grounds raised: Same as page 3

- I. WHERE THE EXISTENCE OF A PHOTOGRAPHIC LINEUP WAS NOT DISCLOSED TO THE DEFENSE BEFORE TRIAL, AND THIS LINEUP PROVIDED THE BASIS FOR CRITICAL IDENTIFICATION EVIDENCE, THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED MR. PARRA'S CONSTITUTIONAL RIGHTS BY REFUSING HIS REQUEST FOR A CONTINUANCE TO SEEK ADDITIONAL DISCOVERY TO PREPARE HIS DEFENSE . . . ■

- II. THE TRIAL COURT ERRED BY INSTRUCTING THE JURY, PURSUANT TO CALJIC NO. 2.92, THAT A WITNESS'S LEVEL OF CONFIDENCE IN HIS OR HER IDENTIFICATION IS A FACTOR THE JURY SHOULD CONSIDER IN ASSESSING THE ACCURACY OF THAT IDENTIFICATION. THERE WAS NO EVIDENCE SUPPORTING SUCH AN INSTRUCTION, AND IT CONSTITUTED AN IMPROPER PROSECUTION PINPOINT INSTRUCTION WHICH IMPERMISSIBLY LESSENED THE PROSECUTION'S BURDEN OF PROOF. . . . ■

- III. IMPOSITION OF AN UPPER TERM SENTENCE VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND *BLAKELY V. WASHINGTON* (2004) 542 U.S. 296 [124 S.CT. 2531, 159 L.ED.2D 403], DESPITE THE CALIFORNIA SUPREME COURT'S DECISION IN *PEOPLE V. BLACK* (2005) 35 CAL.4TH 1238 . . . ■

13. If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to that petition:

(a) Result: _____

(b) Date of result, case number and citation, if known: _____

(c) Grounds raised: _____

COLLATERAL REVIEW IN STATE COURT

14. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Superior Court?

Yes No

15. If your answer to #14 was "Yes," give the following information:

(a) California Superior Court Case Number: _____

(b) Nature of proceeding: _____

(c) Grounds raised: _____

(d) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No

(e) Result: _____

(f) Date of result: _____

16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Court of Appeal?

Yes No

17. If your answer to #16 was "Yes," give the following information:

- (a) California Court of Appeal Case Number: _____
- (b) Nature of proceeding: _____
- (c) Grounds raised: _____

- (d) Did you receive an evidentiary hearing on your petition, application or motion?
 Yes No
- (e) Result: _____
- (f) Date of result: _____

18. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Supreme Court?

- Yes No

19. If your answer to #18 was "Yes," give the following information:

- (a) California Supreme Court Case Number: _____
- (b) Nature of proceeding: _____

- (c) Grounds raised: _____

- (d) Did you receive an evidentiary hearing on your petition, application or motion?
 Yes No
- (e) Result: _____
- (f) Date of result: _____

20. If you did *not* file a petition, application or motion (e.g., a Petition for Review or a Petition for Writ of Habeas Corpus) with the California Supreme Court, containing the grounds raised in this federal Petition, explain briefly why you did not:

COLLATERAL REVIEW IN FEDERAL COURT

21. Is this your first federal petition for writ of habeas corpus challenging this conviction?

Yes No (IF "YES" SKIP TO #22)

- (a) If no, in what federal court was the prior action filed?
 (i) What was the prior case number? _____
- (ii) Was the prior action (CHECK ONE):
 Denied on the merits?
 Dismissed for procedural reasons?
- (iii) Date of decision: _____
- (b) Were any of the issues in this current petition also raised in the prior federal petition?
 Yes No
- (c) If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this second or successive petition?
 Yes No

CAUTION:

- **Exhaustion of State Court Remedies:** In order to proceed in federal court you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. This means that even if you have exhausted some grounds by raising them before the California Supreme Court, you must first present *all* other grounds to the California Supreme Court before raising them in your federal Petition.
 - **Single Petition:** If you fail to set forth all grounds in this Petition challenging a specific judgment, you may be barred from presenting additional grounds challenging the same judgment at a later date.
 - **Factual Specificity:** You must state facts, not conclusions, in support of your grounds. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do. A rule of thumb to follow is — state who did exactly what to violate your federal constitutional rights at what time or place.
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GROUND FOR RELIEF

22. State concisely every ground on which you claim that you are being held in violation of the constitution, law or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and/or facts supporting each ground.

(a) **GROUND ONE:** Petitioner was denied his constitutional right to have a jury determine beyond a reasonable doubt all facts Legally essential to his sentence. in violation of his Fifth, Sixth, and Fourteenth Amendments. The Court of Appeals decision was contrary to established Federal Law.

Supporting FACTS (state briefly without citing cases or law) Petitioner was convicted of one count of battery, the trial court imposed the upper term of four years after determining that the aggravating factors outweighed any mitigating factors. When sentencing Petitioner, the trial court made factual findings pursuant to Penal Code section 669 and 1170, Sub (b), and rules 4.420, 4.421, 4.423, and 4.425 of the California Rules of Court. Specifically, the trial court found that there were three aggravating factors: the crime involved threat of great bodily harm under California Rules of Court 4.421(a)(1); the defendant had engaged in violent conduct which indicated a serious danger to society under Rule 4.421(b)(1); and that his prior convictions as an adult are numerous or increasing in seriousness under Rule 4.421(b)(2). (SRT p. 404) These factual findings were made by the judge alone, apparently based on the preponderance of the evidence standard. (Cal. Rules of Court, rule 4.420(b); Evid. Code, § 664).

Because these factual findings were not determined by a jury and prove beyond a reasonable doubt, and because they resulted in a sentence greater than the statutory maximum under Apprendi¹, petitioner's Fifth, Sixth and Fourteenth Amendment rights to have a jury determine, beyond a reasonable doubt, all the facts which are essential to his punishment was violated.

The State Court of Appeals upheld the upper term sentence based on state Judicial decision in people v. Black², giving power to trial judges to impose upper term sentence on their own.

(Continue next page)

Did you raise GROUND ONE in the California Supreme Court?

Yes No.

1. Apprendi V. New Jersey, supra, 530 U.S. at p. 490
2. People V. Black 35 Cal. 4th 1238 (2005)

1 (Ground ONE, Continev)

2 As we now know but the California Courts could not have devined high-end
3 sentences imposed by the trial judge were declare unconstitutional by Cunningham
4 1/ Reversing Black. And thus the Sta Courts decision to affirm petitioners
5 upper term sentence was contrary to stablish Federal Law and requires reversal
6 of petitioners upperterm Four year sentence.

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1/ Cunningham V. California 127 S.Ct. 856 (2007)

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23. Do you have any petition or appeal now pending in any court, either state or federal, pertaining to the judgment under attack?

Yes No

24. If your answer to #23 is "Yes," give the following information:

- (a) Name of Court: _____
- (b) Case Number: _____
- (c) Date action filed: _____
- (d) Nature of proceeding: _____

(e) Grounds raised:

- (f) Did you receive an evidentiary hearing on your petition, application or motion?
 Yes No

25. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

- (a) At preliminary hearing: _____
- (b) At arraignment and plea: L. Brooks Anderholt 654 Main Street
El Centro CA. 92243
- (c) At trial: Same
- (d) At sentencing: Same
- (e) On appeal: Siri Shetty 110 West C. Street #1810 San Diego CA. 92101
- (f) In any post-conviction proceeding: _____
- (g) On appeal from any adverse ruling in a post-conviction proceeding: Siri Shetty

26. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes No

27. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes No

(a) If so, give name and location of court that imposed sentence to be served in the future:

(b) Give date and length of the future sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes No

28. Date you are mailing (or handing to a correctional officer) this Petition to this court: _____

March 4, 2008

Wherefore, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

Victor Parra In pro se

SIGNATURE OF ATTORNEY (IF ANY)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

March 4, 2008

(DATE)

Victor Parra

SIGNATURE OF PETITIONER

ATTACHMENT - 1

Court of Appeal, Fourth Appellate District, Div. 1 - No. D047704
S148092

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

VICTOR PARRA, Defendant and Appellant.

Petition for review denied without prejudice to any relief to which defendant might be entitled after the United States Supreme Court determines in *Cunningham v. California*, No. 05-6551, the effect of *Blakely v. Washington* (2004) 542 U.S. 296 and *United States v. Booker* (2005) 543 U.S. 220, on California law.

SUPREME COURT
FILED
DEC 20 2006

Frederick K. Ohlrich Clerk

DEPUTY

GEORG

Chief Justice

VERIFICATION

STATE OF CALIFORNIA
COUNTY OF San Diego

(C.C.P. SEC.446 & 201.5; 28 U.S.C. SEC. 1746)

I, Victor Parra DECLARE UNDER PENALTY OF PERJURY THAT: I AM THE Petitioner IN THE ABOVE ENTITLED ACTION; I HAVE READ THE FOREGOING DOCUMENTS AND KNOW THE CONTENTS THEREOF AND THE SAME IS TRUE OF MY OWN KNOWLEDGE, EXCEPT AS TO MATTERS STATED THEREIN UPON INFORMATION, AND BELIEF, AND AS TO THOSE MATTERS, I BELIEVE THEM TO BE TRUE.

EXECUTED THIS 4 DAY OF March 2008 AT Richard J. Donovan Correctional Facility, 480 Alta Road, P.O. Box 799002, San Diego CA. 92179

(SIGNATURE) Victor Parra

(DECLARANTIPRISONER)

PROOF OF SERVICE BY MAIL

(C.C.P. SEC.1013 (a) & 2015.5; 28 U.S.C. SEC.1746)

I, Victor Parra AM A RESIDENT OF Richard J. Donovan Correctional Facility/San Diego County, STATE OF CALIFORNIA. I AM OVER THE AGE OF EIGHTEEN (18) YEARS OF AGE AND AM NOT A PARTY OF THE ABOVE-ENTITLED ACTION. MY STATE PRISON ADDRESS IS: P.O. BOX 799002

ON March 4, 2008 I SERVED THE FOREGOING: Writ of Habeas Corpus (Federal)

(SET FORTH EXACT TITLE OF DOCUMENTS SERVED)

ON THE PARTY (S) HEREIN BY PLACING A TRUE COPY (S) THEREOF, ENCLOSED IN A SEALED ENVELOPE (S), WITH POSTAGE THEREON FULLY PAID, IN THE UNITED STATES MAIL, IN A DEPOSIT BOX SO PROVIDED AT 480 Alta Road, P.O. Box. 799002, San Diego CA. 92179

(To the Clerk)

U.S. District Court
Southern District of California
880 Front Street - Room 4290
San Diego CA. 92101-8900

THERE IS DELIVERY SERVICE BY UNITED STATES MAIL AT THE PLACE SO ADDRESSED, AND THERE IS REGULAR COMMUNICATION BY MAIL BETWEEN THE PLACE OF MAILING AND THE PLACE SO ADDRESSED.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATE:

March 4, 2008

Victor Parra

(DECLARANTIPRISONER)

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating a civil action.

CIVIL COVER SHEET

(a) PLAINTIFFS

Victor Parra Jr.

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

2254	DEFENDANTS
FILING FEE PAID	
Yes	No <input checked="" type="checkbox"/>
HPP MOTION FILED	
Yes	No <input checked="" type="checkbox"/>
COPIES SENT TO	
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND	
Court	Press

Tilton, et al

FILED

MAR 13 2008

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DEPUTY

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) ATTORNEYS UNKNOWN

Victor Parra Jr.
PO Box 799002
San Diego, CA 92179
P-58682

'08 CV 0472 J LSP

II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)

- 1 U.S. Government Plaintiff 3 Federal Question
(U.S. Government Not a Party)
- 2 U.S. Government Defendant 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(For Diversity Cases Only)

- | | | | |
|---|---|---|--|
| Citizen of This State | <input type="checkbox"/> PT <input checked="" type="checkbox"/> DEF | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> T <input checked="" type="checkbox"/> DEF |
| Citizen of Another State | <input type="checkbox"/> 1 <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 <input type="checkbox"/> 6 |

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

28 U.S.C. 2254

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reappointment
<input type="checkbox"/> Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury-Medical Malpractice	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury - Product Liability	PROPERTY RIGHTS	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 450 Commerce/ICC Rates/etc.
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability	PERSONAL PROPERTY	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 371 Truth in Lending	SOCIAL SECURITY	<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 153 Recovery of Overpayment of Veterans Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 861 HIA (13958)	<input type="checkbox"/> 850 Securities/Commodities Exchange
<input type="checkbox"/> 160 Stockholders Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 875 Customer Challenge 12 USC
<input type="checkbox"/> Other Contract	<input type="checkbox"/> 360 Other Personal Injury	LABOR	<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 195 Contract Product Liability	REAL PROPERTY	<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 892 Economic Stabilization Act
<input type="checkbox"/> 210 Land Condemnation	CIVIL RIGHTS	<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	FEDERAL TAX SUITS	<input type="checkbox"/> 894 Energy Allocation Act
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 240 Tort to Land	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 791 Empl. Ret. Inc.		<input type="checkbox"/> 950 Constitutionality of State
<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> Security Act		<input type="checkbox"/> 890 Other Statutory Actions

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

- 1 Original Proceeding 2 Removal from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from another district (specify) 6 Multidistrict Litigation 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23

DEMAND \$

Check YES only if demanded in complaint:

JURY DEMAND: YES NO

VIII. RELATED CASE(S) IF ANY (See Instructions): JUDGE

Docket Number

DATE 3/13/2008

SIGNATURE OF ATTORNEY OF RECORD

CR

R. Muller